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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/826,829	04/16/2004	Jacques Owen	MCCART-5	1733
7590	08/10/2005		EXAMINER	
James A. Sheridan Pandiscio & Pandiscio, P.C. 470 Totten Pond Road Waltham, MA 02451-1914			WINSTON, RANDALL O	
			ART UNIT	PAPER NUMBER
			1655	

DATE MAILED: 08/10/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/826,829	OWEN ET AL.	
	Examiner Randall Winston	Art Unit 1655	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 16 April 2004.  
 2a) This action is FINAL.                    2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1-7 is/are pending in the application.  
 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
 5) Claim(s) \_\_\_\_\_ is/are allowed.  
 6) Claim(s) 1-7 is/are rejected.  
 7) Claim(s) \_\_\_\_\_ is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All    b) Some \* c) None of:  
     1. Certified copies of the priority documents have been received.  
     2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
     3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) Notice of References Cited (PTO-892)  
 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)  
 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
     Paper No(s)/Mail Date 0604.

4) Interview Summary (PTO-413)  
     Paper No(s)/Mail Date. \_\_\_\_\_.  
 5) Notice of Informal Patent Application (PTO-152)  
 6) Other: \_\_\_\_\_.

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**DETAILED ACTION**

***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 2-7 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 2 recites the indefinite for the phrase "approximately equal volumes". The metes and bounds of the above terms cannot be clearly delineated as the specification fails to set forth the metes and bounds of what is encompassed. (what are the approximately equal volumes?).

Claims 3-7 state the phrase "use". Since claims 3-7 does not set forth any steps involved in the method /process of "use", it is unclear what method/process applicant is intending to encompass. A claim is indefinite where it merely recites without any active, positive steps delimiting how this use is actually practiced.

Claims 3-7 are also rejected under 35 U.S.C. 101 because the claimed recitation of a use, without setting forth any steps involved in the process, results in an improper definition of a process, i.e., results in a claim which is not a proper process claim under 35 U.S.C. 101. See for example *Ex parte Dunki*, 153 USPQ 678 (Bd.App. 1967) and *Clinical Products, Ltd. v. Brenner*, 255 F. Supp. 131, 149 USPQ 475 (D.D.C. 1966).

Claims 3-7 "use" claims are also indefinite because it is unclear if the claims are product or process claims. Therefore, for examination purposes, claims 3-7 will be examined as product claims.

All other claims depend directly or indirectly from the rejected claims and are, therefore, also rejected under 35 U.S.C. 112, second paragraph for the reasons set forth above.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Morice (US 6680074) in view of Sine et al. (US 6423329) Tozaka (US 6391347) and Romano et al. (US 6103683)

Applicant claims a photo fluid comprising of essential oils from balsam fir, thyme, lavender, thuja and ecucalyptus.

Morice teaches (see, e.g. claim 1) a composition comprising of balsam fir as an essential oil having antibacterial properties. Morice does not teach the inclusion of the other essential oils of thyme, lavender, thuja and ecucalyptus contained within its composition. Sine et al. teach (see, e.g. column 11 lines 37-43) essential oils such as lavender and thyme having antibacterial properties. Tozaka beneficially teaches (see,

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e.g. column 1 lines 15-20) an essential oil such as thuja having antibacterial properties. Romano et al. beneficially teach (see, e.g. column 2 lines 28-38) essential oils such as eucalyptus and thyme having antibacterial properties.

It would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made to combine the above instantly claimed essential oil active ingredients to create a phyto fluid composition having antibacterial properties whereas to reduce bacteria in building such as households. This rejection is based on the well established proposition of patent law that no invention resides in combining old ingredients of known properties where the results obtained thereby are no more than the additive effect of ingredients, *In re Sussman*, 1943 C.D. 518. Any mixture of the components embraced by the claims which does not exhibit an unexpected result (e.g. synergism) is therefore obvious.

Accordingly, the instant claims, in the range where no unexpected results are observed, would have been obvious to one of ordinary skill having the above cited references before him.

From the teaching of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

Please note that since claims 3-7 depends on claim 1, claims 3-7 will be examined as a composition. Therefore, Please note, the intended use of the above claimed composition does not patentably distinguish the composition, *per se*, since such

undisclosed use is inherent in the reference composition. In order to be limiting, the intended use must create a structural difference between the claimed composition and the prior art composition. In the instant case, the intended use does not create a structural difference, thus the intended use is not limiting (see, e.g., MPEP 2112).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Randall Winston whose telephone number is 571-272-0972. The examiner can normally be reached on 8AM-5PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Bruce Campell can be reached on 571-272-0974. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

*Susan D. Coe*  
8-3-05

SUSAN COE  
PRIMARY EXAMINER